IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 26, 2005

MUREL LAUGHLIN v. CHERYL M. FILLERS

Appeal from the Circuit Court for Greene County
No. 98CV518 John K. Wilson, Judge

No. E2005-00107-COA-R3-CV - FILED SEPTEMBER 22, 2005

In 1997, a car driven by Cheryl M. Fillers ("Defendant") crossed into the on-coming lane of traffic and collided with a wrecker driven by Murel Laughlin ("Plaintiff"). Plaintiff sued and the case was tried before a jury. At the close of proof, the Trial Court directed a verdict on the issue of liability in favor of Plaintiff. The jury returned its verdict, and a judgment was entered in accordance with the verdict in September 2004, awarding Plaintiff damages for, among other things, damage to his wrecker. Plaintiff filed a motion for new trial or to alter or amend the judgment. The Trial Court denied the motion for new trial or to alter or amend, and specifically approved the verdict of the jury. Plaintiff appeals claiming that the award for damages to his wrecker was inadequate and insufficient as a matter of law, and that the Trial Court erred in refusing to grant a new trial based upon alleged improper and inflammatory statements made by defense counsel in the presence of the jury. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

J. Russell Pryor, Greeneville, Tennessee, for the Appellant, Murel Laughlin.

Thomas L. Kilday, Greeneville, Tennessee, for the Appellee, Cheryl M. Fillers.

OPINION

Background

Plaintiff's wrecker consisted of two parts, a 1989 Ford four wheel drive one ton truck, and the wrecker apparatus. When asked to describe the components of the wrecker, Plaintiff stated: "Well, you've got the truck, and then you have a wrecker, but the wrecker part goes on the back with a boom and a wheel lift. You can lift cars up by the wheels, or you can lift them up underneath." Plaintiff testified: "[my wrecker] had all the specifications for a ton wrecker. Now, if you were going to try to haul like a great big truck, you can't haul it with it because the truck outweighs your wrecker." Plaintiff admitted that his wrecker was a short wheel base wrecker and that it could not haul an all-wheel-drive vehicle.

Plaintiff testified that his wrecker was "[d]emolished" as a result of the accident. He further testified that at time of accident, he was paying off a loan on the truck portion of the wrecker. Plaintiff estimated that the value of his wrecker at the time of the accident was "twenty-four thousand or something." However, Plaintiff admitted that his wrecker was eight years old at the time of the accident and that it had been wrecked and was inoperable when he first purchased it. The evidence shows that Plaintiff purchased the wrecker at salvage for twelve thousand dollars some seven years before the accident. Plaintiff testified that his wrecker had thirty-six thousand miles on it when he purchased it, and that it had a hundred and twenty-nine thousand miles on it at the time of the accident. When asked if the tires were bald at the time of the accident, Plaintiff replied, "I say the tires were, you know, getting - - - some of them were ready to replace." Plaintiff also admitted that he didn't have a liner in the driver's door of the truck at the time of the accident and that the wrecker had been sanded, but was not painted at the time of the accident. When asked if his wrecker was not in good shape at the time of the accident, Plaintiff replied, "It was making me a living." Plaintiff stated:

> I had restored it and painted it at one time, and then, you know, and was in the process of doing it again. I had overhauled the motor because I had problems with it, and I had rebuilt the motor about, I don't know, about fifteen thousand miles back or so, something like that. I don't really know how many miles it had on it when I rebuilt it.

Plaintiff testified that the wrecker unit sits on the chassis of the truck and admitted that there was "probably very little" damage to the wrecker unit itself as a result of the accident. Plaintiff testified that an undamaged wrecker unit, like his, could be unbolted from the truck and set on another truck chassis. Plaintiff testified that he did not unbolt his wrecker unit and place it on another truck because he didn't have the money to buy a truck on which to put the wrecker unit.

J.D. Byrd, a retired wrecker salesman, testified as an expert witness for Plaintiff. Mr. Byrd testified that part of his job responsibilities when selling wreckers was to assess the value of wreckers on a regular basis. Mr. Byrd testified that he saw Plaintiff's wrecker prior to the accident

and opined it was in good condition. Mr. Byrd opined that the value of Plaintiff's wrecker prior to the accident was approximately twenty-two thousand dollars.

When questioned further, Mr. Byrd admitted that he and Plaintiff have been friends since the early 1960's. Mr. Byrd further admitted that although he saw Plaintiff's wrecker driving "on the road several times," he never drove it, got into it, looked under the hood, or inspected it. Mr. Byrd admitted he knew nothing about the tires on Plaintiff's wrecker at the time of the accident. Mr. Byrd testified that he did not know that Plaintiff's wrecker had been wrecked and was inoperable when Plaintiff purchased it. Nor was he aware of how many miles Plaintiff's wrecker had on it at the time of the accident. Mr. Byrd admitted that the mileage would be something to consider when determining the value of a wrecker. Mr. Byrd admitted that his estimate was for a good 1989 Ford F350 four wheel drive with a good wrecker apparatus and not for the specific one that Plaintiff owned. He further admitted that the estimate he gave "was approximate. Retail. That'd be a little high. As a retail price."

Mr. Byrd also testified that if he had known Plaintiff's wrecker had a hundred and twenty-nine thousand miles on it, his estimate "would still be twenty, or in there." However, Mr. Byrd stated: "Just the [wrecker] unit itself is worth more than the truck," as the wrecker unit can be unbolted and set on to another vehicle chassis. Mr. Byrd testified that it would cost approximately $1,500 to separate the wrecker unit from the chassis and attach it to another vehicle. Mr. Byrd testified that a wrecker unit similar to Plaintiff's in good operating condition would be worth ten thousand dollars and testified that Plaintiff's wrecker unit "was worth that."

Marcus Kyker, another friend of Plaintiff's, testified that in 2000, he sold a wrecker similar to Plaintiff's in good condition for six thousand dollars.

During the trial, Plaintiff responded to some questions asked by defense counsel by stating that he could not remember. Plaintiff then stated: "See, if these things are settled every ten years, you might not have such a hard time remembering, but sometimes they go a long time." In response to Plaintiff's statement, defense counsel then asked Plaintiff if he knew how many times his attorney had asked for continuances. Plaintiff's counsel raised no objection to this question or the answer elicited. Later during the trial, Plaintiff's counsel questioned Plaintiff regarding the fact that Plaintiff had to hire a new attorney because his first attorney became a judge. Plaintiff's counsel asked Plaintiff if the fact that the first attorney became a judge caused any continuances. Defense counsel interjected that the record would reflect no continuances based upon this ground. Plaintiff's counsel then raised an objection to defense counsel testifying. The Trial Court instructed the parties to "move on" and they did.

At another point during the trial, defense counsel questioned Plaintiff regarding Plaintiff's alleged psychological injury resulting from the accident. Plaintiff's counsel announced that they would stipulate that the accident did not cause Plaintiff psychological injury. Defense counsel stated: "I can understand him wanting to sandpaper his client now before the jury, but that's not the position he's been taking for the last eight years." The Trial Court then instructed counsel to approach the bench and the remainder of this discussion took place out of the presence of the jury.

During this bench conference, Plaintiff's attorney stated that he didn't mention Plaintiff's psychological injury in his opening and was not going to mention it in closing because he didn't ask about it on direct. As the discussion continued, the Trial Court, as best we can tell from the transcript that we have, stated that it remembered Plaintiff testifying on direct about his nerves having been affected by the accident and that was enough to allow defense counsel to get into that area on cross-examination.

At the close of proof, the Trial Court directed a verdict on the issue of liability in favor of Plaintiff. Despite this directed verdict on liability, defense counsel stated during closing argument that Defendant was "at the mercy of [Plaintiff] with respect to telling how and why this accident happened" because Defendant could remember nothing about the accident and there were no eyewitnesses. Plaintiff raised no objection to these statements when they were made.

The jury returned its verdict and a judgment was entered on September 7, 2004, in accordance with the verdict. Among other things, the judgment awarded Plaintiff $3,500 for damage to his wrecker, $70 for the loss of use of the wrecker, and $1,152.91 for his personal injury. Plaintiff filed a Motion for New Trial and/or To Alter and Amend Judgment, which the Trial Court denied by order entered December 3, 2004. In the December 3 order, the Trial Court specifically approved the verdict of the jury. Plaintiff appeals to this Court.

Discussion

Although not stated exactly as such, Plaintiff raises two issues on appeal: 1) whether the jury's award of property damages for the damages to Plaintiff's wrecker is insufficient and inadequate as a matter of law; and, 2) whether the Trial Court erred in refusing to grant a new trial based upon alleged improper and inflammatory statements made by defense counsel in the presence of the jury.

We first address whether the jury's award for the damages to Plaintiff's wrecker is insufficient and inadequate as a matter of law. "Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict." Tenn. R. App. P. 13(d). As our Supreme Court has explained:

> It is the time honored rule in this State that in reviewing a judgment based upon a jury verdict the appellate courts are not at liberty to weigh the evidence or to decide where the preponderance lies, but are limited to determining whether there is material evidence to support the verdict; and in determining whether there is material evidence to support the verdict, the appellate court is required to take the strongest legitimate view of all the evidence in favor of the verdict, to assume the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and to discard all to the contrary. Having thus examined the record, if there be any material evidence to support the verdict, it must be affirmed; if it were otherwise, the parties would be deprived of their constitutional right to trial by jury.

Crabtree Masonry Co., Inc. v. C & R Constr., Inc., 575 S.W.2d 4, 5 (Tenn. 1978).

Our Supreme Court also has instructed:

> that the "amount fixed by the jury and concurred in by the trial judge will be accepted upon appeal unless there is something to show a violation of the discretion" of the trial judge. We have also said that a jury verdict that has the trial judge's approval is entitled to "great weight," … and that the appellate court "rarely ever" disapproves damages set in this manner. "After [the trial judge] has approved the verdict it is our duty not to disturb it unless it is evident that he failed to keep the jury within reasonable bounds."

Thrailkill v. Patterson, 879 S.W.2d 836, 840 (Tenn. 1994) (citations omitted).

Plaintiff argues that Mr. Byrd's testimony regarding the value of Plaintiff's wrecker was both unopposed and introduced without objection. Plaintiff argues, in part, that since Mr. Byrd opined that Plaintiff's wrecker was worth "twenty, or in there," and that the wrecker unit itself was worth $10,000, then the value of the truck portion was approximately $10,000. Given this and Mr. Byrd's admission that the wrecker unit could be unbolted from the chassis for approximately $1,500, Plaintiff argues that the "absolute minimum amount of damages that the jury could have awarded, given the only competent evidence on the subject . . ." was $11,500.

We disagree. The evidence in the record on appeal also shows that Plaintiff's wrecker was eight years old at the time of the accident, was wrecked and inoperable when Plaintiff purchased it seven years before the accident, had thirty-six thousand miles on it when Plaintiff purchased it, had a hundred and twenty-nine thousand miles on it at the time of the accident, had been rebuilt by Plaintiff once, and was being rebuilt again at the time of the accident.

In addition, Plaintiff's friend and expert, Mr. Byrd, admitted that he never drove Plaintiff's wrecker, got into it, looked under the hood, or inspected it. Mr. Byrd knew nothing about the tires on Plaintiff's wrecker at the time of the accident, was not aware that it had been wrecked and was inoperable when Plaintiff purchased it, and was not aware of how many miles the wrecker had on it at the time of the accident. Mr. Byrd admitted that his estimate was for a good 1989 Ford F350 four wheel drive with a good wrecker apparatus and not for the specific one that Plaintiff owned. He further admitted that the estimate he gave "was approximate. Retail. That'd be a little high. As a retail price."

Further, Plaintiff admitted that there was "probably very little" damage to the wrecker unit itself as a result of the accident and that an undamaged wrecker unit, like his, could be unbolted from the truck and set on to another truck chassis Mr. Byrd testified that the wrecker unit is worth more than the truck portion of the wrecker. Mr. Byrd testified that a wrecker unit similar to Plaintiff's in good operating condition would be worth ten thousand dollars and testified that Plaintiff's wrecker unit "was worth that." However, the testimony of Marcus Kyker, another friend

of Plaintiff's, shows that he sold a wrecker similar to Plaintiff's in good condition several years after the accident for six thousand dollars.

Taking the strongest legitimate view of all the evidence in favor of the verdict, assuming the truth of all that tends to support it, allowing all reasonable inferences to sustain the verdict, and discarding all to the contrary, as we must, we find there was material evidence in the record for the jury to find that the damages to Plaintiff's wrecker totaled $3,500. The evidence shows that the most valuable portion of the wrecker, the wrecker unit itself, was undamaged and that this undamaged portion could be unbolted and set on to another truck chassis. The evidence further shows that Mr. Kyker sold a wrecker similar to Plaintiff's for six thousand dollars approximately three years after the accident. The evidence further shows that Plaintiff's wrecker was eight years old, had a hundred and twenty-nine thousand miles on it at the time of the accident, and had been wrecked, and rebuilt by Plaintiff once and that Plaintiff was in the process of rebuilding it again. There is material evidence in the record upon which the jury could have based its verdict that Plaintiff's wrecker was worth less than the estimate Mr. Byrd gave for a good 1989 Ford F350 four wheel drive with a good wrecker apparatus.

In this case, the jury's award of damages received the Trial Court's approval and, therefore, is entitled to "great weight" on appeal. *Thrailkill,* 879 S.W.2d at 840. As there is material evidence to support the jury's award of damages for the wrecker, and we find no abuse of the Trial Court's discretion in approving the award, we affirm the award of damages for the wrecker.

We next consider whether the Trial Court erred in refusing to grant a new trial based upon alleged improper and inflammatory statements made by defense counsel in the presence of the jury. Plaintiff complains about several alleged improper and inflammatory statements. First, Plaintiff complains about defense counsel asking Plaintiff if he knew how many times his attorney had asked for continuances. We note that this question followed Plaintiff's statement: "See, if these things are settled every ten years, you might not have such a hard time remembering, but sometimes they go a long time." Thus, Plaintiff was the one who initially brought the subject to the attention of the jury. More importantly, we note that Plaintiff's counsel raised no objection to the question regarding continuances or to its answer.

Plaintiff also complains about statements made by defense counsel during closing argument that Defendant was at the mercy of Plaintiff because she was unable to recall the accident. Plaintiff raised no objection to these statements when they were made and made no request for a curative instruction regarding these statements.

As this Court stated in *Grandstaff v. Hawks*,

Objections to the introduction of evidence must be timely and specific.

* * *

> A party who invites or waives error, or who fails to take reasonable steps to cure an error, is not entitled to relief on appeal. Failure to object [to] evidence in a timely and specific fashion precludes taking issue on appeal with the admission of the evidence.

Grandstaff v. Hawks, 36 S.W.3d 482, 488 (Tenn. Ct. App. 2000) (citations omitted).

Plaintiff did not object timely to the question and answer regarding continuances or to the statements made during closing about Defendant being at Plaintiff's mercy. Neither did Plaintiff take any steps to cure the alleged error as to the statements made during closing argument. Therefore, Plaintiff waived any error regarding these issues and is not entitled to relief on appeal.

Plaintiff also complains about defense counsel making the statement: "I can understand him wanting to sandpaper his client now before the jury, but that's not the position he's been taking for the last eight years." Tenn. R. App. P. 36(b) provides that "[a] final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b).

We have reviewed all of the evidence in the whole record. Even if Plaintiff is correct that this statement regarding "wanting to sandpaper his client" was improper, and he may well be, we nevertheless conclude that this statement by Defendant's counsel did not involve a substantial right that more probably than not affected the jury's verdict. This is especially clear given that the Trial Court later directed a verdict as to liability in favor of Plaintiff and the jury then awarded Plaintiff damages. Therefore, Plaintiff is not entitled to a new trial based upon this ground.

We affirm the September 7, 2004 judgment and the Trial Court's December 3, 2004 order approving the verdict of the jury in their entirety.

Conclusion

The judgment of the Trial Court is affirmed, and this cause is remanded to the Trial Court for collection of the costs below. The costs on appeal are assessed against the Appellant, Murel Laughlin, and his surety.

_____

D. MICHAEL SWINEY, JUDGE